

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ANDRE TERRELL FRAZIER,)	
)	
Petitioner,)	Case No. 1:04-cv-397
)	
v.)	Honorable Robert Holmes Bell
)	
PAUL RENICO,)	
)	
Respondent.)	<u>REPORT AND RECOMMENDATION</u>
)	

This is a habeas corpus action brought by a state prisoner pursuant to 28 U.S.C. § 2254. Promptly after the filing of a petition for habeas corpus, the Court must undertake a preliminary review of the petition to determine whether “it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court.” Rule 4, RULES GOVERNING § 2254 CASES; *see* 28 U.S.C. § 2243. If so, the petition must be summarily dismissed. Rule 4; *see Allen v. Perini*, 424 F.2d 134, 141 (6th Cir. 1970) (district court has the duty to “screen out” petitions that lack merit on their face). A dismissal under Rule 4 includes those petitions which raise legally frivolous claims, as well as those containing factual allegations that are palpably incredible or false. *Carson v. Burke*, 178 F.3d 434, 436-37 (6th Cir. 1999). The Court may sua sponte dismiss a habeas action as time-barred under 28 U.S.C. § 2244(d) prior to ordering the respondent to answer. *Scott v. Collins*, 286 F.3d 923, 929-30 (6th Cir. 2002). After undertaking the review required by Rule 4, I conclude that the petition is barred by the one-year statute of limitations.

Discussion

I. **Factual Allegations**

Petitioner is currently incarcerated in the St. Louis Correctional Facility. On November 20, 1997, Petitioner was convicted in the Kent County Circuit Court of one count of first-degree murder, two counts of second-degree murder, three counts of assault with intent to murder and five counts of possession of a firearm during the commission of a felony. The Michigan Court of Appeals affirmed his conviction in an unpublished opinion issued on January 18, 2000, and the Michigan Supreme Court denied his application for leave to appeal on October 30, 2000.

Petitioner filed a motion for relief from judgment in the Kent County Circuit Court on September 13, 2001. The circuit court denied his motion on November 8, 2001. The Michigan Court of Appeals and the Michigan Supreme Court denied his applications for leave to appeal on May 6, 2002 and December 30, 2002, respectively.

On October 30, 2001, while his motion for relief from judgment was pending in the state circuit court, Petitioner filed a habeas corpus petition in this Court. *See Frazier v. Renico*, No. 1:01-cv-706 (W.D. Mich.). The Court dismissed the petition without prejudice on January 2, 2002, pursuant to Petitioner's motion for voluntary dismissal. The Court's order of dismissal (docket #6) indicated that Petitioner had unexhausted claims that he wished to pursue before filing his petition.

In the instant petition, Petitioner raises four grounds for habeas corpus relief.

II. **Statute of Limitations**

Petitioner's application is barred by the one-year statute of limitations provided in 28 U.S.C. § 2244(d)(1), which became effective on April 24, 1996, as part of the Antiterrorism and Effective Death Penalty Act, PUB. L. No. 104-132, 110 STAT. 1214 ("AEDPA"). The one-year

statute of limitations provided in § 2244(d)(1) is new, as there previously was no defined period of limitation for habeas actions.¹ Section 2244(d)(1) provides:

- (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of
 - (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
 - (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
 - (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
 - (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1).

In this case, § 2244(d)(1)(A) provides the period of limitation. The other subsections do not apply to the grounds that Petitioner has raised. Under § 2244(d)(1)(A), the one-year limitation period runs from “the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.” According to paragraph nine of Petitioner’s application, Petitioner appealed his conviction to the Michigan Court of Appeals and Michigan Supreme Court. The Michigan Supreme Court denied his application on October 30, 2000. Petitioner did not petition for certiorari to the United States Supreme Court, though the ninety-day period in which he could have sought review in the United States Supreme Court is counted under § 2244(d)(1)(A). *See Bronaugh v. Ohio*, 235 F.3d 280, 283 (6th Cir. 2000). The

¹Previously, the only time limit was provided in Rule 9 of the Rules Governing § 2254 Cases, which allows dismissal of a petition only under circumstances where the state has been prejudiced by the delay in filing.

ninety-day period expired on January 29, 2001. Accordingly, Petitioner had one year, until January 29, 2002, in which to file his habeas application.

The running of the statute of limitations is tolled when “a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending.” 28 U.S.C. § 2244(d)(2); *see also Duncan v. Walker*, 533 U.S. 167 (2001) (limiting the tolling provision to only State, and not Federal, processes); *Artuz v. Bennett*, 531 U.S. 4, 8 (2000) (defining “properly filed”).² Petitioner filed his motion for relief from judgment on September 13, 2001. At that time, Petitioner had 138 days remaining in the one-year limitations period. A motion for post-conviction relief is considered “pending” during the time between a lower state court’s decision and the filing of a notice of appeal to a higher state court on collateral review. *See Carey v. Saffold*, 536 U.S. 214, 219-20 (2002). It also is considered pending during the period in which the petitioner could have filed a petition for writ of certiorari in the United States Supreme Court, whether or not such a petition actually was filed. *See Abela v. Martin*, 348 F.3d 164 (6th Cir. 2003) (*en banc*), *cert. denied*, ___ S. Ct. ___, 2004 WL 193884 (May 24, 2004). Therefore, the statute of limitations remained tolled until March 31, 2003, ninety days after the Michigan Supreme Court denied Petitioner’s application for leave to appeal.

Petitioner had 138 days from March 31, 2003, or until August 18, 2003, in which to file his habeas corpus petition. Petitioner filed the instant petition on or about June 9, 2004, more than ten months after the statute of limitations expired.³ Accordingly, the petition is time-barred.

²The statute of limitations is not tolled during the period that a habeas corpus petition is pending. *Duncan v. Walker*, 533 U.S. 167, 181-82 (2001). However, the proceedings on Petitioner’s prior habeas case overlapped with the proceedings on his motion for relief from judgment, for which he received the benefit of tolling.

³Under Sixth Circuit precedent, the application is deemed filed when handed to prison authorities for mailing to the federal court. *Cook v. Stegall*, 295 F.3d 517, 521 (6th Cir.), *cert. denied*, 537 U.S. 1091 (2002); *In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997). Petitioner dated his application on June 9, 2004, and it was received by the Court on June 15, 2004. Thus, it must have been handed to prison officials for mailing at some time between June 9 and June 15. For

The one-year limitation period applicable to § 2254 is a statute of limitations subject to equitable tolling. *Dunlap v. United States*, 250 F.3d 1001, 1007 (6th Cir. 2001). A petitioner bears the burden of showing that he is entitled to equitable tolling. *See Allen v. Yukins*, 366 F.3d 396, 401 (6th Cir. 2004); *Jurado v. Burt*, 337 F.3d 638, 642 (6th Cir. 2003); *Griffin v. Rogers*, 308 F.3d 647, 653 (6th Cir. 2002). The Sixth Circuit has repeatedly cautioned that equitable tolling should be applied “sparingly” by this Court. *See Jurado*, 337 F.3d at 642; *Cook v. Stegall*, 295 F.3d 517, 521 (6th Cir.), *cert. denied*, 537 U.S. 1091 (2002); *Dunlap*, 250 F.3d at 1008-1009. There are five factors to be considered in determining whether equitable tolling applies: (1) the petitioner’s lack of notice of the filing requirement; (2) the petitioner’s lack of constructive knowledge of the filing requirement; (3) diligence in pursuing one’s rights; (4) absence of prejudice to the respondent; and (5) the petitioner’s reasonableness in remaining ignorant of the legal requirement for filing his claim. *Dunlap*, 250 F.3d at 1008 (citing *Andrews v. Orr*, 851 F.2d 146 (6th Cir. 1988)). These five factors are not necessarily comprehensive, and one or more factors may not be relevant in a particular case. *See Jurado*, 337 F.3d at 643.

Petitioner has failed to raise equitable tolling or allege any facts or circumstances that would warrant its application in this case. The fact that Petitioner is untrained in the law, was proceeding without a lawyer, or may have been unaware of the statute of limitations for a certain period does not warrant tolling. *See Allen*, 366 F.3d at 403; *Brown v. United States*, No. 01-1481, 2001 WL 1136000, at *3 (6th Cir. Sept. 21, 2001) (citing *United States v. Baker*, 197 F.3d 211, 218-19 (6th Cir. 1999)); *Fisher v. Johnson*, 174 F.3d 710, 714-15 (5th Cir. 1999) (“ignorance of the

purposes of calculating the statute of limitations, the Court has given Petitioner the benefit of the earliest possible filing date.

law, even for an incarcerated pro se petitioner, generally does not excuse [late] filing.”).

Accordingly, Petitioner is not entitled to equitable tolling of the statute of limitations.

The Court of Appeals has suggested that a habeas petitioner is entitled to notice and an adequate opportunity to be heard before dismissal of a petition on statute of limitations grounds. *See Scott*, 286 F.3d at 930. This report and recommendation shall serve as notice that the District Court may dismiss Petitioner’s application for habeas corpus relief as time-barred. The opportunity to file objections to this report and recommendation constitutes Petitioner’s opportunity to be heard by the District Judge.

Recommended Disposition

For the foregoing reasons, I recommend that the habeas corpus petition be denied because it is barred by the one-year statute of limitations.

Dated: June 22, 2004

/s/ Joseph G. Scoville

United States Magistrate Judge

NOTICE TO PARTIES

Any objections to this Report and Recommendation must be filed and served within ten days of service of this notice on you. 28 U.S.C. § 636(b)(1)(C); FED. R. CIV. P. 72(b). All objections and responses to objections are governed by W.D. Mich. LCivR 72.3(b). Failure to file timely objections may constitute a waiver of any further right of appeal. *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981); *see Thomas v. Arn*, 474 U.S. 140 (1985).